No. 608.

Brief of O'Brien v. Rinehart for Appellees.

Filed Oct. 13, 1896.

Supreme Court,

Of the

UNITED STATES.

October Term A.D. 1896.

No. 608.

RAY W. JONES, Appellant,

vs.

PATRICK MEEHAN and JAMES MEEHAN, Appellees.

The appellees oppose the motion to advance this cause upon the calendar, and for the following reasons, to wit:

First: That sufficient notice has not been given, in that the same was not served upon counsel for appellees, in the state of Minnesota, until the 3rd day of October, 1896.

Second: That the record herein has not been printed pursuant to the rule of this Court, and that no copy thereof has been furnished appellees.

Third: That no sufficient reason for the granting of the same is alleged.

And appellees urge, in support of their contention that sufficient notice has not been given, that, by analogy to the rule of this Court in regard to notice of motion to dismiss, the notice should have been served at least three weeks pri-

or to the day of hearing.

Further, as the record has not been printed, and no copy furnished counsel for appellees, it would seem that the motion is prematurely made.

The record printed below and used in the Court of Appeals for the Eighth Circuit, upon the hearing of the motion made by appellees to dismiss the appeal heretofore taken to that Court, is imperfect, and the use of the same in that Court was only consented to by appellees in the confident expectation (which was realized) that the appeal taken to that Court would be dismissed for want of jurisdiction.

This cause does not involve any such question as is alleged in the motion herein, or any question of public importance, or any such question as, under the rules and practice of this Court, entitles the same to precedence over other pending controversies involving questions of private rights.

No question involving the right of the government to supervise or control the contracts of Tribal Indians is presented, nor any question arising under any Intercourse Act, law or treaty, save only the particular article of the treaty in question which contains reservations to two Indians only, and of these only a leased portion having an alleged rental value of Four Hundred Dollars per annum, is in any way in controversy.

The only questions involved are as to whether under the terms of Article 9 of the Treaty of October 2nd, 1863, with the Red Lake and Pembina Bands of Chippewa Indians, such a right or interest in the lands thereby reserved vested in the Chief Mon-se-moh, named therein, that upon his death the same descended to and was inherited by

his son and heir-at-law, the present chief, the common lessor of the parties hereto, and as to whether, the lands having been definitely located by subsequent selection, the present chief has the right to make a lease of the same without the necessity of approval by the officers of the government.

The land in controversy is a strip ten feet in width and about 750 feet in length along the Red Lake River, of which appellees obtained a lease in 1891. Later, in 1894, appellant obtained a lease of about thirty acres, including said strip, and appellant's lease was approved by the Secretary of the Interior. Appellees' lease was never so approved, and its approval never sought, the statement to the contrary in the motion being false, as shown by the record.

Appellees claim that the reservation contained in the treaty stipulation operated as an absolute grant, the definite location of which was fixed by subsequent selection made by the present chief and the proper officers of the government, and that the same became an allotment to him within the meaning of the Allotment Act of 1887, thereby making him a citizen of the United States, the entire controversy depending upon the construction of the language of the article referred to—identical terms not appearing in the provisions of any other law or treaty.

We submit that the cause should take the ordinary course.

Respectfully,

C. D. O'BRIEN,

ORVILLE RINEHART,

Counsel for Appellees.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

RAY W. JONES,
APPELLANT,

v.

PATRICK MEEHAN AND JAMES MEEHAN,
APPELLEES.

No. 237.

Appeal from the United States Circuit Court for the District of Minnesota.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This was a suit to quiet title to a strip of land ten feet in width along the westerly shore of the Red Lake River, in the county of Polk and State of Minnesota, extending from the northeasterly intersection of the plat of the village of Thief River Falls with said shore to a point near the junction of the Thief and Red Lake rivers, and being a part of lot No. 1 one (1) of section No. thirty-four (34) in township No. one hundred and fifty-four (154) N. of range

No. forty-three (43) W., and which constitutes the westerly side of a mill-pond, used by appellees for the purpose of stringing booms and storing logs, appurtenant to a sawmill owned and operated by them at that place.

The appellees claim under a lease made and executed by one Mon-si-moh, or Moose Dung, a chief of the Red Lake band of Chippewa Indians, dated November 7, 1891, and duly filed and recorded in the office of the register of deeds in and for the said county of Polk on the 10th day of November, 1891, leasing to them the land in controversy for the term of ten (10) years from the date thereof.

The appellant claims a right to the possession of the whole of said lot one (1), embracing the lands in controversy, under a lease dated July 20, 1894, from said Mon-si-moh to appellant, and thereafter modified and approved by the Secretary of the Interior of the United States.

The appellees are both residents and citizens of the State of Wisconsin, and the appellant is a resident and citizen of the State of Minnesota. The matter in dispute exceeds in amount the sum or value of five thousand dollars, and involves the interpretation and construction of a certain article of the treaty between the United States and the Red Lake and Pembina bands of Chippewa Indians concluded at the Old Crossing of the Red Lake River October 2, 1863.

At the time of the commencement of this suit the appellees were in actual possession and occupancy of the premises; and the appellant having asserted a right to possession and attempted to enter thereon, an injunction in restraint thereof issued *pendente lite*, and was made permanent by the final decree.

Prior to its cession to the United States, the Red Lake and Pembina bands of Chippewa Indians claimed to own

all the territory west of the line of the cession made by the Chippewas of the Mississippi, Billager and Lake Winnibigoshish, including the vast extent of country round about Red Lake and the Red River of the North.

By the treaty of October 2, 1863, the Indian title was extinguished to all territory west of the Thief River in the State of Minnesota, across the Red River of the North, and to the boundaries of the disputed Sioux country at the headwaters of the Cheyenne.

That treaty was concluded between Hon. Alexander Ramsey, then a Senator of the United States from the State of Minnesota, and Ashley C. Morrill, United States Indian agent in charge of the Chippewa Indians in Minnesota, commissioners on the part of the United States, on one side, and the chiefs and head men of the Red Lake and Pembina bands of Chippewa Indians, on the other, in council; and was thereafter advised and consented to by the Senate of the United States. (13 Stat. 669.)

Mr. Joseph A. Wheelock was secretary of the council during the negotiations, and Mr. Paul H. Beaulieu, official interpreter for the Chippewa Indian Commission, was the interpreter between the contracting parties.

A part of the consideration for this vast cession was the grant by the United States, out of the ceded country, of a section of land, to the Chief Moose Dung, made by Article IX of the treaty, which in terms is as follows:

"That upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of six hundred forty (640) acres near the mouth of Thief River for the Chief Moose Dung." (13 Stat. 669.)

This chief was one of the principal chiefs of the bands

entering into the treaty; his name appears first among the signers to the instrument, and he died before the extension of the public surveys over the territory in question, leaving surviving him a son and heir, the present Chief Mon-si-moh, or Moose Dung, appellees' lessor.

At the time of the making of such survey, and about the 10th of September, 1879, the present Chief Moose Dung, having previously indicated to the proper officers his desire so to do, did make selection, by legal subdivisions according to the lines of the Government survey, of the tract of land to which he was entitled by the provisions of the article of the treaty; which selection was approved by the Secretary of the Interior, and the lands comprised therein were officially designated and reserved from other disposition by the United States.

Lot No. one (1) in section thirty-four (34), ten feet of the shore line of which constitutes the property in controversy in this suit, is a portion of the lands so selected and set apart.

From the time of such selection to the date of making appellees' lease, the present Chief Moose Dung lived upon, cultivated portions of, exercised dominion over, and claimed to own the lands so selected; and during all the time since the making of the treaty the two chiefs, in succession, have sustained tribal relations with the tribe or band of Indians resident upon the adjacent and formerly unceded Red Lake Indian lands, now known as the Red Lake reservation.

The lease from Moose Dung to the appellees leased unto them, for the term of ten years, at an annual rental of twenty-five dollars, ten feet of the bank of Red Lake River, along the west shore of the river, across said lot one (1), etc., to be used for sorting logs, erecting piers and booms, and for purposes connected with lumbering,

and conveyed all shore right in the premises. It was signed, sealed, witnessed, and acknowledged on the 7th day of November, 1891, and was properly recorded, on the 10th day of the same month, in the office of the register of deeds of the county wherein the land lies. The appellees accepted the lease and have fully performed, on their part, all of its terms and conditions, and shortly after its execution, and in the year 1892, entered upon the premises, drove piling, strung booms, and used the same in the manner customary with lumbermen exercising shore rights; and before the commencement of this suit had erected and occupied on the ten-foot strip a house, and had enclosed the strip with a fence.

At the time of the making of the lease the land selected by Moose Dung was used only for grazing purposes. It is in the vicinity of the village of Thief River Falls, which then contained but about fifty inhabitants, and there was then no railroad or industry of consequence there and land was of little value.

Shortly after the making of the lease the appellees erected on the river, a short distance below the land in controversy, a large sawmill, and, conditioned on building the same, they induced the Great Northern Railway Company to extend its line of railroad into the village, which has since developed into a place of some importance.

The lands in controversy constitute one shore of the mill-pond appurtenant to the appellees' sawmill, and are claimed to be indispensable to its operation.

On the 20th day of July, 1894, and while appellees were in the use and occupancy of the premises in the manner detailed, the appellant obtained a lease from the same lessor, Moose Dung, of the whole of said lot No. one (1), embracing the ten-foot strip leased to the appellees, and

afterwards presented the same to the Secretary of the Interior for approval, and the same was, after modification, approved by him, and, claiming under said lease and approval, the appellant has attempted to enter into possession of the strip occupied by appellees.

These facts are not disputed.

The appellees, by their amended bill, assert the absolute title of their lessor, the Indian chief, to the land in controversy, while the appellant, in his answer, alleges the Indian to hold only a limited or qualified estate therein, subject to the paramount title of the United States, and that a lease or conveyance thereof by the Indian, in order to be of any validity, must have been made under the sanction and with the approval of the officers of the United States charged with the administration of Indian affairs; and although many other allegations in relation to the actual possession of the appellees and their rights to a preliminary injunction, and the bona fides of the repective parties, are contained in the pleadings, these latter were all, upon the final hearing, subordinated to and merged in the decisive question as to the nature of the title held by the Indian chief, their common lessor.

The testimony was taken before a special examiner, and a vast amount, both oral and written, was introduced by each of the parties—that of the appellees being directed more especially to proof of their lease and possession thereunder and the notice to the appellant of the same, and to proof of the intention of the parties to the treaty in support of the alleged title of the Indian; and that of the appellant to proof of his lease and the approval thereof by the Secretary of the Interior, and his lack of notice of any rights or possession of the appellees in the premises, and finally to the proof of an additional lease from five other alleged heirs of the deceased Chief Moose Dung,

which he attempted to set up by way of supplemental answer; both parties uniting in the introduction of the treaty and plats of the lands, with the proceedings had in the survey, selection, and definite location of the same, at the request of the Indian, by officers of the Government.

The decree of the Circuit Court having been in favor of the appellees, complainants therein, and a decree entered accordingly, the appellant, defendant therein, has taken and perfected an appeal to this court, predicated upon the several assignments of error contained in the record.

In this connection it is fitting to remark that, notwithstanding the great bulk of the testimony introduced in the cause, there is but little conflict in the evidence, and that mostly upon issues comparatively unimportant.

THE PROPOSITIONS CONTENDED FOR BY THE APPELLEES.

These are:

I. That, by the provisions of the treaty of October 2, 1863, the Chief "Moose Dung," ancestor of appellees' lessor, became vested with the absolute title to 640 acres of land, within the ceded country, near the mouth of Thief River, the definite boundaries of which were to be established by subsequent selection.

II. That, upon the decease of the Chief "Moose Dung," the reserve named in the treaty, in 1872, the estate thereby granted descended to and was inherited by his eldest son, the present Chief "Moose Dung," appellees' lessor, as heir at law and successor.

III. That the selection of the lands in controversy by the heir and successor of the original grantee, and the designation thereof, in 1879, by the officers of the Department of the Interior, operated to identify and permanently establish the location and boundaries, and finally effectuate and complete the terms of the grant.

IV. That, in 1891, at the time of the making of appellees' demise, the lessor therein, the present Chief "Moose Dung" possessed the inherent right, and full power and qualification, to make and execute any contract or conveyance in relation to, or disposing of, the lands in controversy.

V. That the appellees' demise is a good, valid, and binding lease of the lands in controversy, duly executed by said present Chief "Moose Dung," and accepted by the appellees, who have, upon their part, performed all the terms and conditions thereof and entered into, and ever since the date thereof have been in, the actual possession and occupancy of the lands in controversy thereunder.

VI. That at all times during the negotiations alleged to have been had by appellant respecting the lands in controversy he had notice of the existence of appellees' prior lease thereof, and knowledge of their possession and occupancy of the premises thereunder.

VII. That the alleged lease under which the appellant claims is invalid, of no legal force or effect, and insufficient to create any interest in, or right to, the possession of the property in controversy.

VIII. That the alleged lease which appellant attempted to set up by way of supplemental answer is invalid and of no force or effect, and insufficient to create any interest in, or right to, the possession of the property in controversy, and that appellant's motion for leave to file the said supplemental answer was properly denied.

I.

Appellees' first contention is that by the provisions of the treaty the Chief "Moose Dung" became vested with the absolute title to 640 acres of land the definite boundaries of which were to be established by subsequent selection.

The important subject for consideration, in the discussion of this proposition, is the effect of the following treaty stipulation:

Article IX. "Upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of (640) six hundred and forty acres near the mouth of Thief River for the chief 'Moose Dung,' and a like reservation of (640) six hundred and forty acres for the chief 'Red Bear,' on the north side of Pembina River."

This treaty was entered into by the treaty-making power of the United States, under the provisions of the federal Constitution, with a tribe or band of the Chippewa nation of Indians, recognized as capable of entering into and maintaining treaty relations by the political department of the Government. It must be conclusively presumed that the Indians were properly represented by their chiefs or head men at the making thereof.

There can be no doubt of the right of the treaty-making power to alienate portions of the national domain; this is a right so well recognized by the settled law of

nations as to call for but casual reference; and grants by treaty by the United States to individuals have been very numerous.

This practice early obtained the sanction of the Supreme Court, in the case of Johnson *v.* McIntosh, 8 Wheat. 598, where it was said: "The usual mode adopted by the Indians for granting lands to individuals has been to reserve them in a treaty, or to grant them under the sanction of the commissioners with whom the treaty was negotiated."

And more recently: "There are many authorities where it is held that a treaty may convey to a grantee good title to such lands without an act of Congress conferring it."

Holden *v.* Joy, 84 U. S. 247.

And while the constitutional power to settle rights under treaties in cases purely political reposes entirely in Congress, "that is the peculiar province of the judiciary in cases involving controversies between individuals."

Wilson *v.* Wall, 6 Wall. 83.

And, "so far as treaties concern the rights of individuals, it is often necessary for courts to ascertain by construction the meaning intended to be conveyed by terms used."

Id. and U. S. *v.* Rauscher, 119 U. S. 407.

The principles of construction in cases of this character are stated by this court in Choctaw Nation *v.* The United States, 119 U. S. 28, where it is said: "The rules to be applied in the present case are those which govern public treaties, which, even in cases of controversies between nations equally independent, are not to be read as rigidly as documents between private persons, governed by a

system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

And another general rule, stated by Vattel and quoted with approval by the same court, and of especial application here, is that: "If a treaty be ambiguous in any part of it, the party who had the power and on whom it is peculiarly incumbent to speak clearly and plainly ought to submit to the construction most unfavorable to him."

Vattel, B. 2, Chap. 17, Sec. 264.

At the outset, it should be remembered that the treaty in question in this case was concluded on the one side by the representatives of an enlightened and powerful nation, skilled in diplomacy, able to express themselves in a written language, and understanding the mode and forms of the creation of all the various and technical estates known to the law; that they brought to the treaty ground an interpreter, especially employed by themselves, through whom to carry on the negotiations; and that the written instrument evidencing the treaty was prepared by them, and in their own language.

The other contracting parties were the illiterate representatives of a weak and dependent people, possessing no written language, totally ignorant of all the forms of legal expression, and whose only knowledge of the written treaty was such as was imparted to them by the interpreter of the other contracting party.

What, then, under the principle stated by Vattel, is the rule applicable in circumstances such as these? The Supreme Court again furnishes the answer: "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the

treaty, they should be considered as used only in the latter sense." "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

Worcester *v.* State of Georgia, 6 Peters, 582.

"The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons, equally subject to the same laws."

Choctaw Nation *v.* The United States, 119 U. S. 28.

Doubtful provisions and words of doubtful import in treaties with the Indians are constructed against the United States and resolved in favor of the Indians.

Chickasaws *v.* The United States, 22 Court of Claims, 248.

See also Grotius, Calvo, and Fiore cited *post.*

We come now to a consideration of the particular stipulation in controversy—"There shall be *set apart* from the tract hereby ceded a reservation of 640 acres near the mouth of Thief River for the Chief 'Moose Dung.'"

It would seem to be conclusively established, particularly in view of the decision in Rutherford *v.* Greene, 2 Wheat. 197, and the various adjudications upon the Pacific Railroad land grants, that, whatever the nature or extent of the title granted, it was a grant *in præsenti*, and in the nature of a "float" upon the selection and location of the definite boundaries of which the title would relate

back to and take effect as of the time of the original grant.

It was to be selected within the limits of the territory ceded by the treaty, it was created by the same act which extinguished the Indian title, and took effect from the same instant of time as the cession to the United States and the relinquishment of the tribal right of occupancy of the ceded country.

The term used to express the grant was "set apart"—a "reservation," "for the Chief Moose Dung," and the essential inquiry in the construction of the grant is as to the meaning of these words in the connection in which they appear.

Bouvier, in defining a *reservation*, says that it "is the creation of a right or interest which has no prior existence as such in a thing or part of a thing granted, by means of a clause inserted by the grantor in the instrument of conveyance; a *reservation* is distinguished from an *exception* in that it is of a *new right* or interest." (Law Dict. 582.)

Aside from its frequent application in the designation of public and Indian tribal reservations, the word "reservation" is one of common use in the grant of lands to individuals by treaty stipulation between the Government and the Indian tribes, where it has been used as a correlative equivalent and in the same connection with nearly every legal phrase and expression conveying title to land.

In many of these cases, by some further provision of the treaty, grants or patents were provided for, and that fact might be urged to distinguish them from the present, where only the words grant or conveyance are those under consideration, no further act or thing being agreed to be done.

The use of the word "reservation," however, so soon became understood as equivalent to and synonymous with the word "grant" in its application in these instances, that it early received that judicial interpretation, and in a case similar to the present (in that no further grant or evidence of title was provided for), decided in the Supreme Court of Mississippi, it is said: "The term 'reservation' was equivalent to an absolute grant. The title passed as effectually as if a grant had been executed. In this case the treaty has not contemplated a further grant or other evidence of title, showing conclusively that by the terms used it was intended that a perfect title was thereby intended to be secured."

Niles *v.* Anderson, 5 How. (Miss.) 365.

And in a like case the same court again say: "A perpetual and exclusive right of occupancy is not easily distinguished from a fee; a fee is but an inheritable right to occupy or hold to the exclusion of others."

Newman *v.* Doe, 4 How. (Miss.) 558.

And each of these cases is cited with approval by the Supreme Court of the United States in the leading case of Best *v.* Polk, 18 Wall. 116, and the reasons were elaborated upon.

"Can it be doubted that it was the intention of both parties to the treaty to clothe the reservee with the full title? If it were not so, there would have been some words of limitation indicating a contrary intention. Instead of this, there is nothing to show that a further grant or additional evidence of title was contemplated. Nor was this necessary, for the treaty proceeded on the theory that a grant is as valid by a treaty as by an act of Congress, and does not need a patent to perfect it. We conclude, therefore, that the treaty conferred title to these

reservations which were complete when the locations were made to identify them."

Best *v.* Polk, *supra.*

To "set apart" has been defined to be synonymous with "allot," and Webster (Internat. Dict., p. 41,) defines an allotment as "anything set apart," and Rapalje & Lawrence (Law Dict.) define "allotment" and "setting apart" as synonymous.

And of "allot" it has been said: "To contend that the word 'allotted,' in reference to the land guaranteed to the Indians in certain treaties, indicated a favor conferred rather than a right acknowledged would, it would seem to me, do injustice to the understanding of the parties."

Worcester *v.* Georgia, 6 Peters, 582.

The act of Congress of February 26, 1857, commonly called the "Minnesota Enabling Act" granted land to the State for various purposes, among others, for the use and support of the State university, the act in terms is as follows:

"That seventy-two sections of land shall be set apart and reserved for the use and support of a State university."

And it has never been doubted that the title to these university lands was not equally as good and absolute as any other ever granted by act of Congress or otherwise.

No patent is necessary to the validity of such grants.

A patent is only one form of evidence of a grant. It is only issued when provided for by the law or treaty under which the land is granted or disposed of.

"Purchase made at Indian treaties held by authority of the United States have always been held good by the ratification of the treaty, without any patent to the purchasers for the United States."

Mitchell *v.* The United States, 9 Peters, 747.

"The treaty granted the land, but the location had to be fixed before the grant became operative. After this was done, the estate vested, and the right to it perfected, as much so as if the grant had been directly executed to the reservee."

Best *v.* Polk, *supra.*

"The treaty itself converted the reserved sections into individual property."

Doe *v.* Wilson, 23 Howard, 457.

We contend that by an acceptation of the definition of the word "reservation," as widely diffused as are the estates in land, in creating which it has been so universally used, the term has come to have a signification as well understood in that connection as any technical word of grant known to the common law of conveyancing, and that the parties to the treaty must be held to have understood and adopted that signification when reducing the terms of their agreement to writing.

No restriction, condition, or limitation having been imposed upon the grant, it must be presumed to have been in the contemplation of the parties that it should be in fee simple.

Every estate or interest in land is of some duration. The law has recognized and divided them into various classes—estates in fee simple fee tail, for life, for years, at will, at sufferance, by the courtesy, in dower, in expectancy, reversion, remainder, freeholds of inheritance and not of inheritance. Under the definition of which of all these does this particular estate in question fall?

Can it be under the accepted definition of any except a fee? To do so we must import into the grant words of condition or limitation which do not appear in the written instrument.

The naked words of the grant carried the absolute title

to the land forever, subject to be defeated or surrendered only by the act of the grantee or the operation of law.

We are not confined in our argument, however, to the presumed intention of the parties in the use of language. Evidence of the highest character and most absolute verity proves beyond the possibility of contradiction that the construction contended for is true.

This treaty was negotiated and concluded between the accredited representatives of the several contracting parties at a joint council or convention regularly constituted for that purpose. The various demands and concessions of the respective parties were the subject of extended debate; minutes of the proceedings of the council were kept and entered in the journal thereof, under its direction, and a report of all thereof made by the representatives of the United States to the Government; and these are relevant to a proper determination of the meaning intended by the language of the instrument.

It becomes the duty of the court, then, to construe this treaty according to the true intention of the parties.

"And when this duty arises the court adopts those general rules applicable in the construction of statutes, contracts, and written instruments generally, in order to effect the purpose and intention of the makers."

United States *v.* Payne, 8 Federal, 892.
The Amiable Isabelle, 6 Wheaton, 1.
U. S. *v.* Percherman, 7 Peters, 83.
North German Lloyds *v.* Hedden, 43 Federal, 20.

In construing doubtful provisions of the Constitution the courts have frequently consulted the debates of the convention by which it was framed, and even the contemporaneous writings of the members.

The journals of Congress and the Congressional Globe or Record have been referred to.

Blake *v.* National Banks, 23 Wallace, 307.

There can be no distinction in principle between such an application of the rule and one applying it to the inspection of the journal or the proceedings of a joint convention of so solemn a character as that assembled for the arbitrament of the affairs of two nations.

And that this position is alike sound in reason and eminently proper in practice is demonstrated by the fact that the Supreme Court, in the case of The Choctaws *v.* The United States, 119 U. S. 18, 19, 20, considered in evidence, as bearing upon the construction of the treaty involved in that case, all the proceedings leading up to the making of the treaty and the correspondence which had passed for years between the Government and the Indians relative to the claims supposed to have been adjusted by the treaty.

In so doing, this court manifestly applied the principle stated by Vattel (*ante*) and its own declaration in Choctaw Nation *v.* United States, 119 U. S. 98:

"The rules to be applied in the present case are those which govern public treaties, which even in cases of controversies between nations equally independent are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

The jurists agree upon this principle of construction:

"I do not admit what many writers have held, that the contracts of kings and people are to be interpreted according to the Roman law, except when the Roman law has been accepted as belonging to the law of nations, which is not likely to be presumed."

2 Grotius De Jure Belli et Pacis, C. 16, Section 31.

"The principle which generally prevails in this respect is that a treaty is to be interpreted in favor of that party to the profit of whom the obligation has been subscribed and against him who grants, for the reason that he is to be held as having given without restriction everything of which the nature of the thing given, or of the engagement undertaken, is composed.

"One ought, in order to attain a reconciling construction (pour arriver à la conciliation), to investigate the facts and circumstances which have immediately preceded the signature of the convention, to examine the protocols, the proces-verbaux or the other writings drawn up by the negotiators, to study the motives or the causes which have produced the treaty (la raison d'être de l'acte)."

I Calvo Dict. de Droit Inter. Title Interpretation.

"An examination of the motives which produced the convention and the discussions relative to the stipulations of the several agreements when the proces-verbaux of the preparatory labors have been preserved, which preceded the compilation of the treaty, will be an efficacious aid in interpreting the true sense of each stipulation."

2 Fiore Trattato di Diritto Internazionale Pubblico, Cap. VI, Section 1074, page 339.

In this case the appellees introduced in evidence before the examiner (Record, page), the report of the commissioners on the part of the United States, made to the political department of the Government, relating to the circumstances and negotiations of the treaty. (House of Representatives, Executive Documents, First Session Thirty-Eighth Congress, Vol. 3, page 547, No. 6.)

Accompanying and annexed to this report is the journal of the proceedings connected with the negotiations of the treaty, and both were returned and filed in the office of the Commissioner of Indian Affairs.

Appellees also produced and introduced in evidence (Record, pages 122, 123, 124, 125, Exhibit E) a duly certified copy of so much of such report and the journal as have relation to the adoption of Article IX of the treaty and the grant of the land in controversy. (Record, page .)

The fact that a journal of the proceedings was duly, accurately, and truthfully kept, and returned and filed in said office was also proven by the oral testimony of both Gov. Ramsey, one of the commissioners, and Mr. Wheelock, secretary of the commission. (Record, pages 104 to 112.) And these facts are not attempted to be denied. It is also proven and not denied that the portions introduced in evidence contain all the reference to the grant in question appearing in the journal.

The entries were made by a public officer in the discharge of the duties of his office, and are competent evidence of the facts recited.

The accuracy of the "journal" is further attested by the report of the commissioners, which refers thereto as follows: "Accordingly, on Wednesday, the third day after my arrival, we held one first general council, a report of which, as of all subsequent proceedings, carefully prepared by the secretary of the commission, will be found in the annexed journal."

A reference to the journal (Record, page 123) shows that Moose Dung, one of the representatives of the Indians and the grantee of the land in controversy, in the course of a speech delivered in the council, made use of the following language:

"I have taken the mouth of Thieving River as my inheritance—I used to think that was the proper place for me to settle—that it would be an inheritance for my children—where all my children could have enough to live on in the future."

And (Record, page 124) that Mr. Ramsey, in response to a speech of this same Moose Dung in relation to the same lands, said:

"Tell him I don't care anything about the mouth of Thieving River. He can have it if he wants it."

So it is conclusively established that the parties intended, by the use of the words in the treaty, to convey an estate of inheritance, and to grant the *land*.

And again, looking at the article of the treaty in the light of a contract, and adopting "those general rules applicable in the construction of contracts and written instruments generally, in order to effect the purpose and intention of the makers" (U. S. *v.* Payne *et al.*, *supra*), we find that we are able to bring to our aid in this investigation other and entirely competent and reliable testimony.

"The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee; or, in case he had parted with his interest, in favor of his grantees, and the obligation is not less imperative and binding because entered into by the Government."

Crews *v.* Burcham, 1 Black, 356.

Had this contract been entered into between individuals, and any ambiguity lurked in its terms, or had it failed to express the real agreement of the parties, a court of equity would not have hesitated to have afforded relief.

In behalf of the grantee, either to have reformed and enforced it, or, if attacked in the enjoyment of any right arising under it, to have asserted the real intention and agreement of the parties, by way of defense.

"Generally in this country either party may have an agreement specifically enforced with such corrections as the parol proof may show to be necessary to correct a mistake."

Beach, Modern Equity Jurisprudence, Sec. 632.

Or evidence may be received by way of defense to show the real agreement.

Gillespie *v.* Moon, 2 Johns. Ch. 585.

And so enforce the agreement *made.*

Born *v.* Schrenkeisen, 110 N. Y. 59.

And likewise relieve mistake *in use of terms in reducing the agreement to writing.*

Pitcher *v.* Hennessey, 48 N. Y. 415–423.

And the settled weight of authority in courts of equity in this country is that the contract may be enforced to accomplish the real agreement of the parties by including or importing into its written terms, as well as to exclude from it what is improperly included.

Olson *v.* Erickson, 42 Minn. 440.

Popplein *et al. v.* Foley, 61 Md. 388, where, upon oral testimony, the words "for 99 years, renewable forever," were inserted in a lease.

But here one of the contracting parties is the United States, and in no direct proceeding instituted by the grantee for the purpose could he obtain relief; it is only when he is disturbed in his rights that he may, as against the

other party, the grantor, the United States, assert the true intent of the contract and invoke the aid of judicial determination in his behalf.

Should he be invaded or disturbed in the enjoyment of his property, or in the exercise of any rights or privileges arising under the contract, by any officer or agent of the Government, or by any person claiming under its grant or authority, he may institute and maintain against such officer or other person any action at law or suit in equity necessary to the protection of his rights, in and about the same, may allege and prove any matter or thing good as against the title claim of the United States.

United States *v.* Lee, 106 U. S. 196.

And parties and their privies stand in like relation so far as the right to rely on the real terms of the contract is concerned. While neither the Chief Moose Dung nor any party in succession or privity of estate to him could ever have maintained any action or suit against the United States to have enforced the grant, or to quiet his right to the title thereof, nevertheless, when disturbed in his possession or enjoyment by any person claiming under the United States, he could set up any matter good against the title of the United States.

The appellees claim under the sole right of the grantee in the treaty; the appellant claims under the authority of the officers of the Department of the Interior, who assert some such title in the United States as to vest in them the control or disposition of the property set apart under the treaty stipulation, a portion of which is here in controversy; the appellees deny that right and assertion, and maintain that those officers have no more jurisdiction in the premises than as to the private property of any other person.

It follows as a necessary conclusion, therefore, in view of the decision of the Supreme Court in U. S. *v.* Lee, *supra*, that any matter may be set up or proven in this case which would be good against the title of the United States, or which could be alleged or proven against the Government, were it amenable to suit relative to the construction of written contracts. Greenleaf states the rule to be that "If the language is vague and have divers meanings, parol evidence is admissible of any extrinsic circumstances, tending to show intention."

Evidence, Vol. 1, p. 367.

It should be borne in mind, however, that the appellees insist that the language of the treaty was in itself sufficient to convey a fee, and that it only becomes necessary to look to extrinsic evidence in view of the attitude of the appellant, who seeks to argue out of it some other estate than that conveyed by its plain import or to impress upon it some ambiguity which it does not, in fact, present.

In McMunn *v.* Owen, 2 Dall. 173, it was said that parol evidence was admissible of a contemporaneous parol agreement explanatory of the written contract between the parties.

And again, in O'Hara *v.* Hall, 4 Dall. 340, the court say:

"If the written contract, upon its face, is ambiguous, doubtful, or uncertain, parol evidence is admissible to explain the understanding of the parties."

"Conversations occurring during negotiations, as well as instruments given, being part of the *res gestæ*, are competent to show the nature of the transaction and the parties to be benefited."

Bank *v.* Kennedy, 17 Wallace, 19.

And in this case the court further say that the belief of one party may be the criterion by which the rights in controversy will be adjusted where that belief was induced by the acts or declarations of the other.

The appellees have introduced oral testimony of several witnesses who were personally present at the negotiation of the treaty, and who heard the request for the land made by the grantee and the response thereto by the commissioners before the treaty was signed or had been reduced to writing.

These were May-dwa-gun-on-ind, or He-that-is-spoken-to, head chief of the Red Lake Indians; the late Pierre Bottineau, guide and interpreter; Robert Fairbanks, trader; Paul H. Beaulieu, the interpreter through whom all the negotiations were conducted; Joseph H. Wheelock, secretary of the commission, and who kept the journal of the proceedings; and ex-Gov. Alex. Ramsey, one of the commissioners on the part of the United States.

May-dwa-gun-on-ind testifies (Record, page 68) that "Mon-si-moh asked for a piece of land on the west side of Thieving River; 'I want that piece of land for myself and also for my children.' The commissioner then said he could have it—'You shall get it,' and I believe he took a piece of paper and wrote it down." And the witness Bottineau testified to the same conversation (Record, page 78); and the witness Fairbanks also (Record, page 98); Mr. Wheelock says (Record, page 104), in response to the question, (36) "You say you remember Thief River being spoken of; in what connection was it spoken of?" (A.) "It was understood that this Chief Moose Dung was to have some land there. He wanted a tract of land there, and it was understood he was to have a tract of land. That was talked about originally. Of course that was a subject of general conversation. Every-

body felt kindly to Moose Dung because he was very efficient and energetic about the treaty. I don't think we could have got along without him, and the people around there—I don't know who now, but pretty nearly everybody were concerned in and about the treaty—and the commissioners talked about this grant of land to this Chief Moose Dung."

And Gov. Ramsey (Record, page 110) says that Moose Dung was a man of great influence; that he was very much impressed with the obligations of the Government to him, and remembers that they made a concession of land to him.

The clearest possible exposition of all the circumstances of the entire transaction is obtained, however, from the testimony of the official interpreter, Mr. Paul H. Beaulieu, a gentleman of the highest proficiency in his profession, and whose abilities are alluded to in the journal of the proceedings (Record, page 123). Mr. Beaulieu testifies (Record, page 102, Q. 36) that Moose Dung "said that he wanted to get a reservation of a section of land at the mouth of Thief River for himself and family to live on, that would be an inheritance for himself and family; that is the word, sir, that he used. Mr. Ramsey said that he would have no objections to giving him that land for himself and family, to which the Indian responded, 'Ho.' That meant all right."

The journal states (Record, page 125) that "at the end of a session of three and a half hours' duration Moose Dung, who has stood for an hour weighing and deliberating on every separate provision of this treaty, asking for this explanation and that modification, appearing to labor under a serious sense of the responsibility he was taking, at last touched the pen which was to affix his vicarious sign-manual to the treaty. He was followed by Broken

Arm, and, one after another, all the chiefs of Red Lake and Pembina ——"

Mr. Beaulieu testifies that Moose Dung at this time asked for an explanation of the article mentioning the land that was to be set apart to him. (Record, page 102, Q. 41.)

"Mon-si-moh (Moose Dung) asked: 'How shall I feel satisfied in my mind that that land shall be mine and my children's forever?' Gov. Ramsey replied to him that there was patents issued in them cases. I spoke then, and I said, I can't state that; there is no such word as 'patent' in my language. I used something else. I said, 'Te-bain-daus-o-mun-duh-e-gun.' That is the nearest I can come to it—a paper that states that it is this: 'You will own it forever;' but that don't convey the true meaning of a patent.' I told him, sir, that that would be a certificate that that land should be his and his children's forever. And then he signed the treaty, and it was signed by the other chiefs." (Record, page 103.)

The Indians were illiterate, and unable to read the written contract; they were entitled to depend upon the translation made to them by the interpreter; that was the only means of information at hand to them. Under like circumstances, in a transaction between individuals, the illiterate party would be entitled, in equity, to have the contract carried into effect according to the explanation made to him.

And appellees are in no materially different position here. Entitled to maintain any action, suit, or proceeding, essential to the protection of the grant, which might have been maintained by their predecessor in interest, they have brought their bill, praying for an injunction, and the proceeding is analogous to that of enforcing the specific performance of a contract, by way of injunction, against

its violation. It is the only remedy open to them, and equity must afford a remedy and means of ascertaining the true rights of the parties here as well as in a controversy arising out of a contract between individuals.

"How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

Worcester *v.* Georgia, *supra.*

Equity will give effect to the real agreement of the parties, rather than to the written evidence of it.

Although powerless to reform the written instrument, we may, nevertheless, rely upon the true intention of the makers.

Appellant insists that the effect of the treaty stipulation was simply to vest in Mon-si-moh the *Indian right.*

There is nothing in the stipulation, in terms or by implication, so confining its operation.

It is true that the term "set apart" is frequently used in reserving by treaty a tract of land for the occupancy of a tribe of Indians; but in all such treaties, where the possessory right only is given to the tribe, some words of *limitation* are always used, as that the land is set apart for their *use* or for their *home.*

The cases Godfrey *v.* Badsley, 2 McLean, 412, and Wheeler *v.* Me-slug-go-me-sia, 30 Indiana, 402, do not in any way militate against the position which we have already taken.

In the case first cited the court says: "It is also admitted that a mere reservation of the Indian right to a certain part within described boundaries leaves the right reserved as it stood before the cession." And further:

"But on looking into these treaties there will be found in the case of Pierre Moran, and many others, more than a mere reservation of the *Indian right*."

In the case in 30 Indiana the reservation was in favor of a band of Indians. The language used was: "From the cession aforesaid the *Miami tribe* reserve for the band of Me-to-sim-ia the following tract of land"—a reservation created by the *tribe only*, and in no way affecting the ultimate title of the United States.

Mon-si-moh already had the tribal right of occupancy; as a chief he had the power to select any of the Indian country for his exclusive use. (Record, page 61.)

"He buries his dead there and calls it his home" (Record, page 61), and Mon-si-moh, prior to the treaty, had selected the land in controversy for his individual use; he had his gardens there and a fish trap in the river. (Record, page 58.)

In view of these facts, it could not have been the tribal right of occupancy which the Indians *urgently requested* should be set apart to him.

They must have understood that unless the United States relinquished all claim to the old chief's selection, he would be deprived of his home by the general cession of the treaty. The tribal title was to be extinguished and a several and exclusively personal title was to be vested in the chief —"set apart" *to him* "upon the request of the Indians." It was not *reserved* as a reservation. It was "*ceded* as a reservation" by both parties to the treaty. (See Art. IX.)

A mere exception of this land from the geographical boundaries of the cession without any reference to Mon-si-moh would have accomplished all that is contended for by appellant. This land would have been left in the same condition as the remainder of the unceded lands,

and the chief, in the virtue of his office, could have remained there as long as the tribal right continued.

But the tribal right had been extinguished by the prior provisions of the treaty.

In construing the Pottawatomie treaty the Supreme Court say: "The treaty itself converted the reserved sections into individual property. The Indians, as a nation, reserved no interest in the territory ceded, but, as a part of the consideration for the cession, certain individuals of the nation had conferred upon them portions of the land, to which the United States title was either added or agreed to be added; and it matters not which for the purpose of this controversy for possession."

Doe *v.* Wilson, 23 Howard, 462.

But whatever may be the technical meaning of the word "reservation," ~~or of the phrase "hereby ceded as a reservation,~~" taken in connection with the words "set apart," or however it may be used as applied to the lands of the Government devoted to a specific use as military or forest reservations, and of which the Government holds the absolute title, or to lands in the occupancy of the Indian tribes, that this is frequently and commonly used to designate *grants in fee* to individuals, by treaty, can admit of no doubt; while, on the other hand, we have, after diligent search, been unable to find an instance, in all the treaties and cases, where a reservation of less than a fee title has been made by treaty in favor of an individual.

Courts have recourse also to another means, extraneous of the written instrument, as a guide to its interpretation,

and that is by ascertaining what construction, by their acts under it, the parties have placed upon it.

"To get at the intention of the parties in making a treaty, courts may consider the construction the parties to the treaty, and who were to be affected by it, have given it, and what has been their action under it."

U. S. *v.* Payne, 8 Fed. 883.

It stands as an admitted fact in this case that the land in controversy was, after the death of the original reservee, upon the request of his son, the present Chief Moose Dung, set apart and designated for the heir of the reservee by the proper authority of the United States, thus recognizing and treating the grant as one of an inheritance. The report of the commissioners and the journal of the proceedings of the negotiation of the treaty were all this time in the archives of the Government, and their contents known to the officials of the Department which made the designation, and it was never doubted or suggested otherwise than (and it was held by the Department) that the grant operated to convey an estate of inheritance and vest a fee title in the reservee; and his son, the lessor, was his heir.

II.

That upon the decease of the Chief Moose Dung, the reservee named in the treaty, in 1872, *the estate thereby granted descended to and was inherited by his oldest son, the present Chief Moose Dung, appellees' lessor, as heir at law and successor.*

The answer of the appellant (Record, page 14) alleges that "said Chief Moose Dung departed this life and left him surviving the Chief Moose Dung, who made and executed this lease to the defendantherein before mentioned, as his oldest son, heir at law and successor."

The definite date of the death of the elder Moose Dung is fixed by the testimony of the witness Leading Feather as the year 1872.

The appellant also introduced in evidence the admission of appellees' solicitor, made at appellant's request, "that the living Chief Mon-si-moh, commonly called Moose Dung, was the eldest son and successor to all rights of his father under the treaty of October 2, 1863, and the son of the Chief Mon-si-moh who signed that treaty." (Record, page 132.)

We might have rested here had not appellant, upon this proposition, in the face of his express stipulation to the contrary, served a motion to be allowed to file a supplemental answer setting up rights claimed to have been acquired by him since the commencement of this suit. This we disputed his right to do, and, having had no opportunity to take testimony upon the issue thus attempted to be presented, we wish to call the attention of the court to some facts appearing in the record, and undisputed, as furnishing conclusive reasons why the motion for leave to file the supplemental pleading was properly

denied, and these other than such as might be urged as mere matters of practice, but going at once to the question of the legal rights involved.

In the first place, the pretended instrument of lease introduced as the foundation of appellant's new right does not recite any new or moving consideration as moving from the appellant than the performance, on his part, of conditions which he was already legally bound to perform, and, the consideration being expressed, we are not at liberty to presume another or different one; it is a *nudum pactum*.

Next, it appears to be made by persons claiming as joint tenants or tenants in common with the original lessor.

And appellant claims in their right, and *now* at least, at the time of procuring this additional lease he surely must have had actual knowledge of our rights or claims in the premises, for he can hardly be heard to allege that he was at that time ignorant of our possession and prior lease.

The lease which he attempts to set up by way of supplemental answer does not appear to have been approved by the Department of the Interior, and we must be led to believe that he has abandoned his contention that the acts or contracts of an Indian must be so approved.

Supposing, for the sake of argument, that appellees had a lease from one only of several tenants in common, would the other tenants, or their representative, or successor in interest or estate, be entitled to maintain an action against the lessee from the first, without first giving notice to quit, or disaffirming the act of their co-tenant, who must be presumed to have acted in behalf of all?

We call the attention of the court to the fact that

although this lease bears date four days previous to the examination of the lessors named therein, the appellant asked of them no question relative to its making, and that such fact was not disclosed until several days thereafter, and when we had no opportunity to examine into the circumstances of its execution. (Record, page 281 and 166.)

It has been well established that a lease from one tenant in common and the payment of rent to him was a bar to an action for use and occupation at the suit of the other tenants.

Decker *v.* Livingstone, 15 Johns. 479.

And that such a lease operates to give the right of possession.

Rising *v.* Standard, 17 Mass. 282.

And that the lessee is entitled to a notice to quit from the other tenants, as a disavowal and termination of the rights under the lease.

Ord *v.* Chester, 18 Cal. (Baldwin, J.)

Assuming that appellees' lessor was a tenant in common, he was not only such a tenant but a tenant in common in possession, and so long as he was suffered to retain control of the common property his acts in relation thereto would bind his co-tenants, and he has received the rent for the current year, and his co-tenants are bound thereby at least.

Moose Dung is shown by the testimony of every witness who testified on that point to have been in the actual and exclusive possession of the premises in controversy

for many years—at least since the date of the allotment in 1879.

But appellees assert that he was the sole owner of the property. That even conceding that the other persons named in said lease were the children or grandchildren of the elder chief, they would still not be entitled to inherit any interest in this estate.

It appears in evidence that the old chief had a first wife, the mother of the present chief, and that while she was still living with him he took another, by whom he had children, and through whom some of said alleged co-tenants claim to be descended, it not appearing distinctly whether two or four of the present claimants. (Record, page 225.)

The defendant does not inform us to what rights he claims through this second or bigamous alliance of the old chief, as he introduces no evidence of any Indian custom or law sanctioning such a relation.

However that may be, we are brought finally to the main question, and that is this: that, even conceding these alleged co-tenants to be descended from said ancestor, are they heirs to this property?

The witness John George Morrison (Record, pages 60, 61-62) testifies that he is a member of the Chippewa tribe, and was raised among them; that he knows the laws, customs, and usages of the Chippewa Nation in regard to the inheritance of real property; that, by the law of descent among those Indians, at the death of a chief his eldest son would be entitled to succeed to all his property and estate as well as to the office of chief; that Moose Dung was a hereditary chief of the tribe, and that upon his death the present chief was entitled to and did succeed to all of his property, including the property in controversy.

And Moose Dung himself, called in behalf of the appellant, testified (Record, pages 228, 229, Qs. 25, 26, 27, 28, 31) that he was the eldest son of the first wife; that the children of the second wife were not entitled to the same rights as those of the first; that he succeeded his father as chief by reason of being the eldest son of the first wife; that by the laws, customs, and usages of the tribe he was entitled to so succeed; that he also, and by the same right, inherited the property in controversy, and that it is his, and that his father left it to him at his death, and to no one else.

And none of this testimony was contradicted, or attempted to be, by the appellant. What, then, are the rights of these other alleged co-tenants?

The appellant claims that they have been found to be the heirs of the old chief, by the Department of the Interior.

But here he is met by the decision in the case of Richardsville *v.* Thorp, 28 Federal, 52, where the court, in a parallel case, say: "The Secretary of the Interior, while competent to adjudicate on the facts, has no authority to establish a rule of evidence or of *inheritance* binding on the courts." So it is for the court to determine whether this property descended according to the law of the State of Minnesota or the laws, customs, and usages of the Chippewas.

In the early case of Dole *v.* Irish, 2 Barb. 639, which was an application for an injunction to restrain probate of the estate of an Indian, the court says: "I am also of the opinion that the distribution of Indian property, according to their customs passes, a good title which our courts will not disturb." Appellant has laid great stress upon the fact that the former chief in his lifetime and these living descendants have always been tribal Indians,

and we willingly concede that in 1872 and at the time of his death they were so.

"If the tribal organization of the Shawnees is preserved intact and recognized by the political department of the Government as existing, then they are 'a people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the Government of the Union."

Kansas Indians, 5 Wallace, 755.

"Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws."

The Kansas Indians, 5 Wall. 737.

In another case the deceased was the patentee of an allotment lying in the midst of white settlements in the county of Wyandotte, Kansas, but was still a member of the Indian tribe. Mr. Justice Brewer, sitting in the Supreme Court of Kansas, held that, "It appearing that the tribal organization was still recognized by the political department of the United States Government, the descent is cast not under the State law, but in accordance with the law of the tribe."

Brown *v.* Steele, 23 Kansas, 473.

The Supreme Court of the State of Minnesota has expressly disavowed the application of the laws of that State in the probate of the estate of a deceased tribal Indian owning land in fee. It prohibited the probate court from entertaining jurisdiction of the proceeding. They say that the individual real property of a tribal Indian,

acquired from the Government, is not within the civil jurisdiction of the State.

U. S. *ex rel.* Davis *v.* Shanks, 15 Minn. 369.

And the same court, in a well-considered opinion by Mr. Justice Mitchell, say:

"There is no decision of the federal courts that a State can, even in the absence of a restriction in a treaty, or in the act admitting the State into the Union, extend its laws, either criminal or civil, over tribal Indians residing, under the care of the General Government, upon a reservation set apart by it for that purpose."

State *v.* Campbell, 53 Minn. 357.

The real property of an individual Indian is just as much protected from the operation of State laws as is that of the tribe. If the title has never vested in a white man so as to lose its character of *Indian property in lands*, it retains its original character and exemption, although owned in severalty by an individual Indian.

This is the doctrine of Chancellor Kent and is referred to with approval by the Circuit Court of the United States for the District of Indiana in Wau-pe-man-qua *v.* Aldrich, *infra*.

But another and higher guaranty operates in this instance.

The provisions of the ordinance of 1787 for the government of the territory northwest of the river Ohio were, by the act of April 20, 1836, creating the Territory of Wisconsin, extended to so much of the Louisiana purchase as is comprised within the present area of Minnesota and the Dakotas. This provides as follows: "The

utmost good faith shall always be observed towards the Indians; thier lands and property shall never be taken from them without their consent, and in their property rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress" etc.

Land granted to an Indian by treaty, in severalty, was, under the provisions of this ordinance, held not to be subject to the operation of State laws, in—

Wau-pe-man-qua *v.* Aldrich, 28 Federal R. 498.

Mr. Justice Harlan concurred; and this decision would seem to preclude the necessity for a further citation of authorities upon the proposition contended for.

III.

That the selection of the lands in controversy by the heir and successor of the original reservee, and the designation thereof, in 1879, *by the officers of the Department of the Interior, operated to identify and permanently establish the location and boundaries, and finally effectuate and complete the terms of the grant.*

The appellant alleges (Record, page 14) in his answer, "That afterwards the Government of the United States,

through its proper officers, set apart and designated said lot one (1) in section thirty-four (34), among other lands, as the reservation selected for said elder Chief Moose Dung in said treaty."

It is also admitted that the ten-foot strip in controversy and said lot one (1) in said section thirty-four (34) is a part of the land so selected.

The facts in the record as to the selection are shown by the correspondence of the Department of the Interior. (Record, pages 125 to 129.)

"The treaty granted the land, but the location had to be fixed before the grant became operative. After this was done, the estate vested, and the right to it perfected, as much so as if the grant had been directly executed to the reservee."

Best *v.* Polk, *supra.*

IV.

That, in 1891, *at the time of the making of appellees' lease, the lessor therein, the present Chief Moose Dung, possessed the inherent right and full power and qualification to make and execute any contract or conveyance in relation to or disposing of the lands in controversy.*

We now arrive at the consideration of the necessity or effect of the so-called *approval* of the Secretary of the Interior of appellants' alleged lease.

The assumed necessity for any action on the part of the Government in the premises, or for any approval of a lease or other conveyance made of the land in controversy by the Indian, Moose Dung, the lessor, can only be predicated on one or the other of two assumptions—the first, that the United States still holds the fee title to the land, and that the Indian has not an estate therein of sufficient duration or extent on which to found a lease for a term of years; and the second, that, even conceding that the Indian owns the fee of the land or an estate therein of sufficient duration or extent to support a lease, he has not legal capacity to make the contract in relation thereto, for that, being an Indian, he is thereby an incompetent person, and his acts and contracts and the disposition of his property are under the control and supervision of the officers in charge of Indian affairs of the Government of the United States.

The first of these assumptions we have demonstrated to be erroneous. The question as to the second is:

Was Moose Dung *sui juris* when he made appellees' lease? He is admittedly a man of some sixty years of age, in the full possession of all his faculties, and not alleged to be under disability other than that he is chief of a band of Chippewa Indians, and that he participates in the payments of annuities which are derived by the tribe as the purchase money of cessions of land to the Government.

The Supreme Court, in the case of Doe *v.* Wilson, 23 Howard, 462, say:

"Although the Government alone can purchase lands from the Indian nations, it does not follow that when the

rights of the nation are extinguished, an individual of the nation who takes as private owner, cannot sell his interest. The Indian title is property and alienable, unless the treaty has prohibited its sale."

In the absence of a regulation of law to the contrary, an Indian has the same inherent right as any other person to sell what he owns.

And all statutes and treaty stipulations restraining the disposal of Indian property are *disabling* acts. And all enabling acts simply permit the beneficial disposition of some interest less than an absolute ownership.

And in the absence of enabling or disabling acts alike, a conveyance by an Indian of an allotment to which he holds the equitable title (under the act of March 3, 1843, 5 U. S. Stat. 645) is good.

Quinby *v.* Denny, 18 Wis. 510.

An alien Chinese and an American Indian have each an equal right to enter into any contract, unless expressly prohibited by law.

Sho *v.* Julius, 1 Wash. Ter. 325.

And he may also sell what he owns.

Crews *v.* Burcham, 1 Black, 352.

And see—

Prentiss *v.* Stearns, 113 U. S. 435.

But, moreover, Moose Dung, in addition to being a man, is a citizen of the United States and of the State of Minnesota.

The act of Congress of February 8, 1887, section 6,

vol. 24 Stat. at Large, page 390, commonly known as the Indian Allotment Act, provides in terms as follows:

"And every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any law or treaty, is hereby declared to be a citizen of the United States, whether said Indian had been or not by birth or otherwise a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property."

The present Chief Moose Dung is shown to have been born at Red Lake, in what is now the State of Minnesota, and to be a member of the Chippewa tribe of Indians.

The *allotment* was the *setting apart* and designating to him of the land granted by the treaty.

And the fact that he still appears upon the annuity rolls of the Government, dwelt upon at length by appellant, is within the express exception of the statute.

And so Moose Dung was not a person *sui juris*, but a citizen, and as such was a voter in Minnesota; and his contracts are as far removed from the control and supervision of the officers of the United States as are those of any other person or citizen.

The treaty agreements cited by appellant showing that the Chippewa Indians have acknowledged themselves to be under the protection of the United States refer only to the political relations of the Indian nations to the Government; they were entered into at a time when large domains now included in the territorial limits of the United States were owned or claimed by foreign nations, and when

there was danger of the Indians allying themselves with those nations, or acknowledging allegiance to them.

In colonial times and for some years after the formation of our Government the various Indian tribes in this country had the power to alienate their tribal title of occupancy, but they could not create in their grantee, by conveyance, a fee title without the consent of the Government. They could, however, transfer an absolute title by securing the consent of the Government to *their* conveyance of the land. The tribes would still have power to transfer their possessory right of occupancy without the consent of the Government but for statutory enactments prohibiting such sales.

"Sales made by the Indians transferred the kind of rights which they possessed."

Mitchell *v.* U. S., 9 Peters, 711.

"The person who purchases land from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection and subject to their laws. If they annul the grant, we know of no tribunal which can revive and set aside the proceeding."

Johnson *v.* McIntosh, 8 Wheaton, 586.

But, by statute, the Indian nations and tribes have been, at least since the year 1790, prohibited from disposing of even their *tribal* title.

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian *nation* or *tribe* of Indians, shall be of any validity in law or equity unless the same be made by treaty or convention entered into pursuant to the Constitution."

U. S. Rev. Stat., Sec. 2116, p. 369, Chap. 3.

This provision was taken, *verbatim*, from sec. 12 of the

trade and intercourse act of June 30, 1834, 4 Stat. 730. That this act has no application to individual Indians holding lands in severalty, and that the Congress intended that there should be no statute or law placing Indians, generally, under legal disability to contract with respect to their individual real property, clearly appears from an examination of the several acts of Congress regulating trade and intercourse with the Indians preceding the act of 1834.

The act of July 22, 1890, provided that "no sale of lands made by any *Indians*, or any nation or tribe of Indians," should be valid.

Stat. at Large, p. 137.

The act of March 1, 1793, Sec. 12, provided that "no purchase, grant, lease, or other conveyance of lands, or of any title or *claim* thereto, from any *Indian*, or nation or tribe of Indians," should be of any validity in law or equity.

1 Stat. at Large, p. 472.

By Sec. 12 of the act of May 19, 1796 (1 Stat. 469), and by Sec. 12 of the act of March 3, 1779 (1 Stat. 743), that provision last above quoted was re-enacted.

These were followed by the act of March 30, 1802 (2 Stat. 139), containing the same provision, and this latter statute remained in force for thirty-two years, and until *expressly repealed* by the last trade and intercourse act which has been passed—the act of 1834—from which was taken section 2116 of the Revised Statutes, above quoted, the present law.

It will be seen, therefore, that from at least the year 1790 until 1834 no valid sale, lease, or conveyance of land could be made by any *Indian;* that by the repeal contained in the

act of 1834 *supra* the policy of the Government with regard to the land of individual Indians was entirely changed, the inhibition being removed from individuals but continued as to tribes and tribal lands. Since 1834 there has been no change in the law on this subject, and since then the practice has been, in granting or reserving lands to individual Indians in severalty, to limit the grantees' power of disposition, if a restraint were desired, by *express provision* to that effect inserted in the treaty or act whereby the grant was made; and the fact that these special restrictions exist in individual cases is ample proof that since 1834 there has been in existence no general statute or law placing individual Indians, as a class, under legal disability to dispose of any interest in land possessed by them in severalty. There could be no better evidence of the intention of Congress to permit individual Indians to dispose of any title or interest in land held by them in severalty than the express repeal in 1834 of the only statute which prohibited them from so doing.

The allotment act of 1887 provides that the allottees shall not sell their allotments for twenty-five years.

Act of Feb. 8, 1887, 24 Stat., p. 388.

The Indian Homestead Act prevents the Indian homesteader from disposing of his land for five years.

Act March 3, 1875, 18 Stat., p. 402.

Taylor *v.* Brown, 147 U. S., p. 640.

In some cases the Indian is permitted to sell his land only with the consent of the President, as in Pickering *v.* Lamox, 145 U. S. 310; or with the consent of the Secretary of the Interior, as in Pennock *v.* Commissioners, 103 U. S. 44.

Why these *disabling* acts if the Indian has no legal capacity to contract regarding his own property?

The act of *allotting* the land to the present chief conferred upon him all the rights and privileges of citizenship. This was done in the year 1879.

An Indian may maintain tribal relations and yet be a citizen of the United States, and prior to the act of February 8, 1887 (the allotment act), an Indian might sever his tribal relations, and adopt the habits of civilized life, and yet occupy the *status* of a tribal Indian.

Elk *v.* Wilkins, 112 U. S. 194.

He remains a tribal Indian until naturalized by treaty provision or act of Congress. *Id.*

He cannot be naturalized under the general naturalization laws. *Id.*

The test, then, is not whether an Indian is an annuitant of the Government, or shares in the proceeds of tribal funds, or maintains tribal relations, in determining the question of whether or not he is a tribal Indian or a citizen of the United States.

The test is whether or not he has been naturalized under some treaty provision or special act of Congress.

The intention must have been to naturalize allottees under treaties made prior to the passage of the act of 1887, because no treaties have been made with the Indian tribes for over twenty years, in obedience to the prohibition of the making thereof contained in the act of March 3, 1871.

Rev. Stat., Sec. 2079.

The purpose of the act of 1887 was undoubtedly to make a citizen of every Indian in the United States who then held, or should thereafter acquire, under any law or treaty, land in severalty. Manifestly it was considered by Congress that *citizenship should accompany indi-*

vidual ownership of land by Indians; that they should exercise and enjoy the rights and bear the burdens of citizenship, to the end that tribes might finally be broken up, individuals placed on distinct tracts of land, and the Indians follow the modes, habits, and pursuits of the white men.

There are no grades or classes of citizenship in the United States. All stand on equal footing before the law. While Congress has power to confer citizenship, or prescribe the mode whereby the status of citizenship may be acquired, it has no power to take away the rights, privileges, and immunities of the citizen when once they are acquired.

These are regulated by the Constitution, not by Congress.

Osborn *v.* U. S. Bank, 9 Wheaton, 738–827.

So that Private Resolution No. 5, under which appellant claims, is effective neither for the purpose of construing the article of the treaty nor to abridge the rights of the Indian to contract in relation to the land.

V.

That the appellees' demise is a good, valid, and binding lease of the lands in controversy, duly executed by said present Chief Moose Dung, and accepted by the appellees, who have, upon their part, performed all the terms and conditions thereof, and who entered into, and ever since the date thereof have been in, the actual possession and occupancy of the lands in controversy thereunder.

The lease from Moose Dung to appellees was made November 7, 1891, at Red Lake Falls, Polk county, Minnesota; was duly executed and acknowledged by the lessor, accepted by the lessees, who entered into possession thereunder, and have paid all rentals arising thereby, and was, on the 10th day of November, 1891, duly recorded in the office of the register of deeds in and for the county where the land lies. (Record, page 120.)

Appellees introduced in evidence the record of the lease, proven by the testimony of the register of deeds (Record, page 97), and a certified copy thereof (Record, pages 119–120), each of which is, by the statute of Minnesota, made *primary evidence* of the execution of the instrument; and also the original lease (Record, page 119); and the fact that the lease was recorded as alleged is admitted by the answer. (Record, page 10.)

The appellee Patrick Meehan testifies (Record, pages 21, 22, 23, 24), in regard to the making of the lease, that he agreed with Moose Dung upon the terms; that Moose Dung was at that time living on the land and said that he owned it; that appellees accepted the lease and caused the same to be recorded, and, the same year that it was made, entered into possession of the premises under it and remained continuously in the possession and occupancy thereof ever since that time.

That Moose Dung at all times knew of their possession and occupancy and of all their acts in and about the premises, and always acquiesced therein, and that appellees paid all the rent reserved by the lease and that the lessor, Moose Dung, always received the same.

This lease was witnessed by one Curtis B. Wall; and the acknowledgment thereto taken by Theo. LaBissoniers, a notary public. The appellant called each of these for examination as to the circumstances attending the making of the lease.

The witness Wells acted as interpreter between Moose Dung and the representative of the appellees, and the notary public, at the time the lease was executed; he stated that he was a native of the State of Ohio, and could read the English language and the written lease, and had lived among the Chippewa Indians for fifteen years, and for many years in the same house with one, and had done business with the Indians and had acted as interpreter. (Record, page 207–210.) Appellant's solicitor having shown the witness a copy of appellees' lease, asked him (Q. 21, page 208), "Can you translate that into the Chippewa language literally?" To which the witness answered: "Well, word for word, I don't know as I have got anything—but I can read it over, and did at the time, and explained it to Moose Dung so that he certainly understood it; he seemed to understand." And, upon cross-examination upon the same point, the witness testified, "I meant to explain it to him as well as I could." Being asked the question (x-Q. 6), that it was a lease of ten feet of shore rights up that river, "Didn't you tell him that this would give them the right to go on ten feet of his land up there, so that they could string booms in the river?" he answered: "That I meant to tell him; yes, sir." x-Q. 7. "And that is what you did tell him, as near

as you could come to it in the Chippewa language?" A. "Yes, sir." x-Q. 8. "And you told him how much money they were going to pay him, in the lease for that right that they got there, didn't you?" A. "Yes; the amount mentioned in the lease." x-Q. 9. "And you told him how many years or how long it would run in the future; that they would have a right to do that there, did you not?" A. "Yes, sir." x-Q. 10. "And you explained to him how much shore from the water up that they wanted to use with the water right, didn't you, under the lease?" A. "Ten feet; yes." x-Q. 12. "And that it commenced way down the Red Lake River as far as that first land went, and run up along the river, up along the whole shore line of his land there; told him what it was, the ten feet, didn't you?" A. "*Ten feet; as far as his land went up and down.*" x-Q. 20. "And after you explained to him in Chippewa, as near as it was possible for you to explain the meaning of this instrument, he said he was satisfied with it, didn't he?" A. "Yes, he seemed to be satisfied with it at the time."

And then he says that Moose Dung touched the pen and made his mark to the lease, and acknowledged it, and the notary took the acknowledgment, and he signed as a witness.

And he further said that he understood what Moose Dung said when he talked to him, all the time.

And the testimony of the witness Theo. LaBissoniere, the notary who took the acknowledgment to the appellees' lease, being called in behalf of the appellant, is equally as interesting (Record, pages 231–232). He states that he read the lease aloud, and that Wells asked the chief if he understood it. And (x-Q. 11) that he took the acknowledgment with all the formality that was required of him as a notary according to law, to the best of his knowledge.

It is difficult to perceive what advantage the testimony of these two witnesses was to the appellant, unless he wished to effectually prove the *bona fides* of the lease.

Further than this, the testimony of Moose Dung himself, when called on behalf of the appellant (Record, pages 227–228), shows conclusively that he fully understood the terms and signification of the lease when he made it. He said (x-Q. 2–3) that at the time he made the lease he was living on the land, and he owned it. And (x-Q. 6) that the rent was paid for the current year, and that he received all the rent due and $100 in advance, and (x-Q. 7) that he never told either of the appellees that he was dissatisfied or wanted to terminate the lease. And (x-Q. 10) that he was told that the lease was for the shore right of the property here in controversy, and (x-Q. 12) that he knew the amount of the rent per year, and that he touched the pen and made his mark to the paper (x-Q. 16), that "the interpreter was there also; and there was another man that was there that endorsed the papers up."

Would it be possible for appellees to show more conclusively that the lease was entered in good faith, on their part, in the full knowledge and understanding of its terms by the lessor? And, appellees having accepted the same and entered under it, there would seem to be no necessity for argument upon the proposition that it remains the valid and binding agreement of the parties.

See Camp *v.* Camp, 5 Conn. 300.

Hinsdale *v.* Humphrey, 15 Conn. 431.

And here, in conclusion, it is proper to remark that the pretended suit of Mon-si-moh *v.* the appellees herein has long since been dismissed by the court wherein it was brought, it having been conclusively shown that it was commenced by appellant's counsel herein without any authority from the Indian.

VI.

That at all times during the negotiations alleged to have been had by appellant, respecting the lands in controversy, he had notice of the existence of appellees' prior lease thereof, and knowledge of their possession and occupancy of the premises thereunder.

The appellees' lease was duly recorded, according to the registry laws of the State of Minnesota, for more than three years before the date of appellant's alleged lease.

The alleged lease of appellant, under which he claims herein, bears date July 20, 1894, and purports to have been executed by Moose Dung on that day and by the appellant on the 24th day of the same month, and to have been modified and approved by the Assistant Secretary of the Interior on the 13th day of November of the same year, and also bears two further pretended acceptances, one by the appellant, dated November 16, 1894, and one by Moose Dung, dated December 5, 1894; and it is alleged in the answer (Record, page 15) that the same was finally confirmed and approved by the Secretary of the Interior on the 27th day of December, following. And it

is especially by reason of this alleged action of the Department of the Interior that appellant claims a right to the possession of the premises. All of these acts, then, must constitute parts of the same transaction, and, according to appellant's own contention, the last thereof was necessary to complete the same and vest in him a right of entry and possession of the land.

The appellees claim that, in addition to the notice which appellant had of the appellees' prior lease by the record thereof, he also had actual notice of the same.

That he had this actual notice first before the very inception of his transaction in regard to the lease under which he claims, and that he had actual notice during all the time in which he was carrying on said negotiations.

That this notice was communicated to him not alone by the fact that appellees were in the actual possession of the premises in controversy, but that he was, before said 20th day of July, told of the same and of appellees' rights and lease, and was frequently thereafter, during said negotiations, told the same, and that he saw the said lease in fact and by personal knowledge was well aware of its existence, and that he is chargeable not only with notice, but with bad faith in all his conduct during the entire transaction.

In addition to the testimony of the appellee Patrick Meehan, heretofore referred to, James Meehan testified that the appellees occupied the land in the fall of 1891 by hauling and storing oak piling out on the shore, and that in the winter of 1892 they drove the piling for their booms in the river, appurtenant to the ten-foot strip, and that they used it as a storage for boom timber and the other ordinary uses to which it was adapted as forming one shore of its mill-pond from that time forward; and that on the 14th day of December, 1894, they erected a house

on the strip and inclosed it with a fence, and that ever since that time the house had been occupied by men in their employ. He also testified (Record, pages 55, 56) that the piling along the shore, driven by appellees under their lease, was driven in the ordinary manner usual with lumbermen all over the country, and that he had been in the lumber business for thirty years and knew the general manner of construction of booms and driving of piling by lumbermen exercising shore rights, and that these were constructed and driven in that manner; and that a lumberman seeing piling in a river in such a position as this would naturally look to the ownership of the shore, as they would to him indicate that the person using the river must possess the shore rights.

James Meehan, Jr., who is engaged in the operation of appellees' mill at Thief River, corroborated this testimony and said that the river at that point was about 250 feet wide and that these piles were driven about an average of 30 feet from the shore. (Record, page 93–94.)

And the appellant himself testified (Record, page 132–140, Q. 19) that the piles were the same distance from the shore; and in answer to x-Q. 16 he admits that in July, 1894, and before he had procured his lease he had seen the property in controversy, and these piles in the river, and knew what they were there for. And in answer to x-Q. 52, 53, 54, and 55, he testified that he knew the customs of lumbermen in the construction and operation of piling and booms in rivers, and that in taking his lease he had to have the river or it would be of no value to him; that he was looking for his share of the river, the boomage of half of the river; and he also testified that in order to have obtained the half of the river it would have been necessary to remove the appellees' piling and booms some fifty or seventy-five feet. Right here it is pertinent to

inquire why, if he had no suggestion of appellees' right, was he so particular to incorporate the provision in his lease regarding the shore rights and privileges? Mr. Jones also testified that the entire matter of the negotiation of his lease was left to his solicitor, Mr. Kellogg. (Record, page 236, Q. 3.)

Mr. Kellogg, being examined in behalf of the appellant (Record, page 144), testified that before he obtained the lease to Jones from Moose Dung, he went upon the land in controversy (x-Q. 42), and (x-Q. 56) said: "I was considering lot one with reference to the location of a mill there, and the piling attracted my attention, and I inquired for what purposes they were there, and who put them there, and how they were used," and said (x-Q. 60) that he was informed that they were driven by the Meehans.

And the answer alleges that the piles were *not nearer* than 30 feet to the shore and were at least 30 feet apart.

The witness Wilie (Record, page 85) testified that he told the defendant in person at Thief River Falls, as early as the 4th day of July, 1894, while looking over the property, that the Meehans claimed shore rights there.

The witnesses to the appellant's lease, Knox and Spear, each had knowledge of the existence of the appellees' prior lease at the time they witnessed the execution of appellant's lease, July 20, 1894. The witness Peterson testified (Record, page 96) that early in the spring of that year, in a conversation with Moose Dung and Knox relative to leasing the land, Moose Dung told Knox of the appellees' lease.

Further than this, the notary public who took the acknowledgment of the appellant's lease, W. R. Spears, called in behalf of the appellant (Record, pages 197–199–200), testified (Qs. 28–29) that Moose Dung, in answer to a question by Mr. Kellogg before the lease was signed, said that he had made another lease of the land.

And (x-Q. 27) that he (Spears) knew the Meehans had a lease of the shore rights, and that it was commonly understood at the time the appellant's lease was made that the claims of appellant and appellees conflicted. (x-Q. 61.) He also testified that he knew that the appellees were occupying the land under Moose Dung, and he said (x-Q. 65, &c.) that he told Kellogg that he (Spears) did not want to be mixed up in the conflict between Jones and Meehan.

And the witness Kellogg admitted (Record, pages 141–144, x-Q. 36) that he saw the lease under which appellees claim in the office of the Commissioner of Indian Affairs in Washington before the appellant's lease was approved by the Assistant Secretary of the Interior. And Mr. Patrick Meehan testified that he told both Kellogg and Jones, at Thief River Falls, in September, 1894, that he had a lease of the shore, and claimed the shore right along lot one. (Record, p. 116, Q. 5.)

If anything further were necessary to demonstrate the fact that appellees at all times asserted their rights in the premises, and, whenever either legally or morally bound so to do, gave all parties notice of the existence of their prior lease, it is found in the allegation contained in the answer (Record, page 15) that "from the time he (appellant) first entered into negotiations for said lease appellees have constantly and continually endeavored to prevent and have fought this defendant in his purpose and undertaking."

Can it be doubted that the appellant had knowledge of the rights of appellees, or that appellees have asserted those rights whenever called upon to do so?

Appellant lays great stress upon the facts of the approval of his lease by the Secretary of the Interior. He states that the lease to appellees was disapproved by the

same officer. This last statement is absolutely erroneous, and is not borne out by a syllable of testimony in the entire record. On the contrary, it is expressly denied, and the contrary is shown by the letter from the acting Secretary to the Commissioner of Indian Affairs, introduced in evidence by the appellant. (Record, page 269, 270, 271, 272.) The Secretary says: "I have considered the question of the approval of two leases executed by Mon-si-moh, or Moose Dung, a Chippewa Indian, one to Ray W. Jones, dated July 20, 1894, and the other to P. & J. Meehan, dated August 10, 1894" (not the lease under which appellees claim the land in controversy). "*The point is raised in behalf of Mr. Jones that, because of the character of Moose Dung's title, this Department has no jurisdiction over the matter, to approve or disapprove his lease. In view of the fact that Congress has given this Department authority in the premises, and that Mr. Jones has invoked its action, this point cannot be sustained.*" (What a change of heart.)

The Secretary then says that the joint resolution referred to is sufficient to *obviate* the objections to the Jones lease that it was not executed in the form required of leases of Indian allotments, but that these objections, not being *thus obviated* as to the Meehan lease of August 10, 1894, are sufficient to prevent its approval. He further says: "A question has arisen as to whether the lessor *is in fact the sole heir and representative* of his father, the elder Mon-si-moh; information received since the matter has been under consideration here is to the effect that he *has one* sister. *This man has, however, been in exclusive possession and control of the land since his father's death.*"

This copy was certified January 10, 1895 (Record, page 269), and was immediately used by appellant on a motion

to dissolve the injunction *pendente lite*, issued January 9, 1895 (Record, page 284), and introduced in evidence before the examiner June 8, 1895. (Record, page 131.)

It shows of itself the variety of inconsistent positions attempted to be occupied by appellant, during the various stages of this litigation, upon the character of the title derived under the treaty, the jurisdiction of the Department over the acts of the Indian, and the knowledge of appellant upon the question of the heirship and his lack of all diligence and propriety in making the motion for leave to file the supplemental answer, and the actual possession and occupancy of the land by the Meehans.

Returning to the proposition under discussion, the *bona fides* of the appellant, it would seem that the point raised by appellant, that the record of appellees' lease was not legal notice of its existence because made, as he claims, by a tribal Indian, is hardly worthy of notice.

The recording acts are for the benefit and protection, not of grantors, vendors, and lessors, but of grantees, vendees, and lessees; and while the question of the effect of the record as legal notice might arise as between tribal Indian purchasers or lessees, over whom the civil jurisdiction of the State may not extend, it certainly cannot arise as between citizens of the United States claiming conflicting interests in land in the State. The civil jurisdiction of the State certainly extended over both parties to this controversy at the time they made their respective contracts with the Indian within the limits of the State, and it likewise must have extended to any property interests which they may have had or claimed, or may have or claim, within the State. If any title to, or any right

or estate in, this land passed from the Indian by virtue of the leases, that title, right, or estate must be subject to the operation of State laws while held by persons subject to its jurisdiction. The *right* possessed by either of these lessees had surely lost *its* character of Indian title to land.

VII.

That the alleged lease under which the appellant claims is invalid, of no legal force or effect, and insufficient to create any interest in, or right to, the possession of the property in controversy.

The lease is set out as an exhibit to the answer. (Record, page 17.)

As originally executed by the parties, it appears to be under seal and to contain convenants on the part of the lessee to pay to the lessor, *Moose Dung*, the rental of two hundred dollars per year for twenty years. By the approval of the Department of the Interior, the rental is directed to be four hundred dollars per year for five years, with provisions for arbitration and renewal, but is directed to be paid, not to *Moose Dung*, but to the agent in charge of the Chippewa Indians in Minnesota and by him *paid to the parties to be found entitled thereto by the Department.*

This so-called *approval* is neither the lease of the Government of the United States nor of Moose Dung. It does not purport to convey any interest of the United States in the premises, and if it did it would have been absolutely void, as executed without authority, as there is no provision of law for leasing the public land; it must have proceeded upon the assumption of some supported right of guardianship residing in the Department of the Interior over the contracts of an individual Indian. None such has ever before been asserted to exist. The fact that the Government exercises a guardianship over the affairs of Indian nations does not warrant the interference by a particular branch of the Government with the personal affairs of an individual Indian.

The Congressional Resolution No. 5 set up in the answer is absolutely void and unconstitutional.

"Congress has no constitutional power to settle or interfere with rights under treaties, except in cases purely political."

Holden *v.* Joy, 84 U. S. 247.

Attached to this so-called approval are what purport to be two acceptances, one by Moose Dung and one by appellant.

Neither is under seal, neither expresses a consideration, and that of Moose Dung is clearly *nudum pactum*.

The approval, in so far as it assumes to make any contract or alter or supervise one already made, is void.

The acceptance of a void approval can be no contract.

The approval and acceptances are not entitled to record in the county where the land lies, and any possession attempted to be asserted under them must be *actual*.

An entry on land for the purpose of making surveys, when no further acts of possession are done, is not such an entry or possession as would be sufficient to entitle a party to maintain this suit, or even to put the statute of limitation into operation; it is no occupancy or possession. By the courts it is said to be too cursory in its nature to impress upon the land the claim of the entryman.

To assert in the same breath that appellees were not in possession, by their logs, piling, and booms and mill-pond, but that appellant was, by the driving of a stake, is compatible only with the various and shifting positions assumed by the appellant.

We might also, at the risk of being considered technical, say, in this connection, that the lease to appellant is shown to have been executed and acknowledged before a notary public of the State of Minnesota within the limits of the Red Lake Indian reservation, and out of the civil jurisdiction of the State, and therefore not entitled to record, for the reason that it is not properly acknowledged and that it is not properly proven here in evidence.

The cause of the appellees is that of equity and good conscience. It is shown by the evidence, and undisputed, that at the time of entering into their lease the country about the land in controversy was new and undeveloped. Moose Dung, in all the years which had gone before, had never even been offered for the use of the entire section what appellees paid for the first year's rental of the ten-foot strip.

If the property embraced in the lease has now any greater rental value than at the time of its execution, the appellees, and no one else, are entitled to the credit of making that condition possible; theirs is the only industry founded in the place, and they caused the railroad to be brought in, and transformed a wilderness into civilization.

They are shown to have expended over $200,000 in an enterprise which has been the only source of the rise in the value of any property in the vicinity of Thief River Falls; and now, as a reward for their honest endeavor, they are subjected to the attack of an adventurer, who admits that he has not a dollar invested in all that country, save such as he has expended in seeking to break down the appellees' lease.

We ask a careful consideration, by the court, of the following propositions:

1. There being no restraint upon Moose Dung's power of alienation, he had an absolute right to dispose of such interest in the land as he may have acquired, whatever the extent of the same.

2. Hence, any proceedings by the Government looking to the approval or disapproval of any of the Indian's leases must have been nugatory and void.

3. Appellees having the actual seisin, their possession alone entitled them to maintain the suit.

Gen'l Statutes, Minnesota, 1878, page 814, Sec. 2.
Holland *v.* Challen, 110 U. S. 15.

4. Appellees were entitled to the decree unless appellant showed a title superior to appellees' actual seisin.

5. Moose Dung, the common lessor of both parties, having a fee title, there being no restraint upon his power of alienation, appellees' lease was valid *per se*.

6. If it be held that Moose Dung had not a fee title, but only a possessory right, or some estate or interest in

the land less than a fee, appellees were nevertheless entitled to the decree, for their lease carried such estate or right, if any, as the lessor possessed, to the extent of the leaseholder interest which appellees' lease purported to transfer.

7. If it be held that Moose Dung had no title whatever, appellees were still entitled to the decree as against the appellant, for in such a case all leases made by the Indian are equally void, and appellant had no title to enforce as against appellees' *possession*.

8. If the Indian had no title his void lease to appellant could not be made effectual by an approval of the same by the Government.

9. The so-called "approval" secured by the appellant *is not a lease of the land*, nor does such approval purport to transfer *any right from the Government* to the appellant.

10. Under the approval appellant can claim no right of possession by estoppel, for there can be no estoppel against the Government.

11. The joint resolution of Congress authorizing the approval of the lease to appellant does not specify what legal effect such approval shall have.

12. It was not in the power of Congress to place any construction on the article of the treaty prejudicial to any party claiming under it, nor to presume to say what was meant by the language of the treaty.

13. If Moose Dung had no title, then the title was in the Government, and the approval by the Government of a void lease to appellant could not operate to transfer any right to appellant.

However, it would seem clear that the elder Moose Dung *either* acquired a fee title which descended to his heirs, *or*, that he was given a personal right of occupancy

which terminated when he died. And, for the reasons already stated, appellees were entitled to the decree in either case.

The appellees claim that the Indian, Moose Dung, was the absolute owner of the land; that he possessed the right to dispose of the same; that the lease to appellees is a good and valid demise of the land in controversy; that the appellant has at all times had both actual and constructive notice of the same; that the pretended rights asserted by appellant are invalid and illegal; that justice and equity demanded, alike for the Indian and the appellees, that the grant contained in the treaty be given effect; that appellees should be adjudged to have a good and valid lease, the conditions of which they have faithfully performed.

And, for these reasons, that the decree appealed from should be affirmed.

C. K. DAVIS,
FRANK B. KELLOGG,
C. A. SEVERANCE,
Counsel for Appellees.